Constitutions and constitutional law in Richard Albert's book

by Luigi Melica

Abstract: The aim of this paper is to offer some theoretical thoughts about the most important form of alteration of the Constitutions: the constitutional procedural amendments rules. In commenting on the considerations of Richard Albert in his recent book, this paper focuses on the importance of the definitions and of their legal effects on the constitutional theory. Thus, giving emphasis to the Albert's theory, the paper highlights the limits of those theories based on the "quantification" of the constitutional amendments. All of this is instrumental for developing some observations on the effects produced by the ongoing interaction between the EU and the constitutional changes concerning the balanced budget reform: how should be classified these amendments from the Member State's perspective? Do they constitute a case of a dismemberment of their Constitutions?

Keywords: Constitution; constitutional law; amendment's procedures; EU; Member States.

1. The importance of the definitions and their juridical effects

Albert's research[1] deserves praise for his contribution to the comparative law for a number of reasons. Firstly, for the extraordinary number of constitutions quoted, ranging from those more studied to those less known. From this viewpoint, Albert's book represents a valuable source of information for all comparative legal scholars. Secondly, the research has a paradigmatic value due to the great emphasis and importance given to the constitutional norms. This consideration can be evinced by retracing some of the arguments drawn from Albert's research.

Let's begin from the Introduction, when Albert immediately clarifies the aim of the book and its topics[2]. To this end, he wonders: «What is a constitutional amendment, an amendment in name alone? Or something different, potentially affecting people's life?» and then, «Why constitutional designers choose to write amendments procedure into their Constitutions? Just for a conformity [...] other designers did it so also we ...?». These questions, as Albert will stress in Part 1, *Forms and Functions*, section 2 - "The Boundaries of Constitutional Amendment" - need a deep enquiry.

[1] R. Albert, *Constitutional Amendments. Making, Breaking, and Changing Constitutions*, Oxford, 2019.

[2] Albert, in the *Introduction*, highlighted that his book is structured «both as a roadmap for navigating the intellectual universe of constitutional amendments and as a blueprint for building and improving the rules of constitutional change».

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Indeed, the author, by commenting on the historical Corwin's amendment before the USA's Civil War, asserts: «the question whether a given alteration is an amendment requires an enquiry deeper than asking only whether the alteration is made in conformity with the codified rules of change». If we follow this approach, he continued, the amendment's procedural rules become extremely important, since they could not be considered an «afterthought in constitutional design», but, on the contrary, they are key subjects of research, since «no part of a Constitution is so important than the procedures we use to change it». In line with these considerations, having regard to the great number of research devoted to the judicial interpretation and, more in general, to the informal amendments of the Constitutions, the author is surprised to observe that comparative scholars only rarely do research on the used procedures to change the constitutional texts. More often, they tend to privilege studies devoted to techniques of alteration of the Constitutions which are, after all, a distortion of the codified rules of amendments[3].

On the contrary, if scholars properly investigated on the constitutional amendments' procedures definitions and scopes, they would find a wide variety of possible research subjects. That's why Albert gave emphasis to the "definitions"[4], making clear the distinctions between, respectively, the "amendment" and the "amendment's rules", and, about the latter, among the "variety of the amendment's procedures"[5]. According to him, indeed, the scholars' "textual approach" together with the "strict proceduralist" approach is unsatisfactory[6], since "some alterations are mere adjustment; others are revolutionary, and still others fall somewhere in between". Correctly, Albert distinguishes between: "routine and the technical change" of the Constitution and "revolution and renewal", explaining that, routine and technical amendments, are used "to refine the constitution to meet unanticipated needs that reveal themselves as either necessary or convenient for the smooth operation of government"[7], whereas revolution and renewal's

[3] The reason of this tendency probably depends by the influence of two important contributions to the modern study of constitutional change: *the theory of constitutional moments* and the *basic structure doctrine* which are, according to Albert, "variation of the same powerful phenomenon that had spread across a growing number countries in the world: the alteration of formal amendments rules without a formal amendment", see, R. Albert, *Constitutional Amendments*, footnote n. 38. See, *amplius*, B. Ackerman, *We the People*, Vol. 1, 1991, Vol. 2, 1998, and Vol. 3, 2014.

[4] See Part I, Section 2 of the book. Particularly, Albert's study reconstructs the subject from the classics recalled in the paragraphs: "The Conventional Theories of Constitutional Change, Four propositions" and "Constitutional Destruction and Reconstruction".

[5] See, also Part I, Section 2 "Boundaries of Constitutional Amendment".

[6] Ibidem, par. "Amendments and Dismemberments", where Albert quotes the «superb studies of constitutional endurance» made by Zachary Elkins, Tom Ginsburg and James Melton (especially in footnote n. 80).

[7] As for the USA constitutional system, the author mentions both the gap of the contingencies in presidential election not adequately accounted by the original constitutional design and the problem of the presidential disability that, similarly, wasn't clearly ruled; as for the French's Constitution he found a similar gap in 1976 when the Constitutional Council was incompetent to postpone the election in case of

amendments are basically adopted to change the constitutional basis of the supreme text, marking the passage from one form of government to another[8].

Well, the logic beneath Albert's above description is that it is unacceptable that both the categories of change are often adopted with the same procedure. «Why», he wonders, «constitutional designers do not mark a difference among the amendment procedures depending on the importance of the amendment?». Certainly, the recent amendment's according to which French Lawmakers removed the word "race" from the Constitution, adding the article now stating that all citizens are equal, «regardless of gender, origin or religion», should represent something more than just an amendment. The same argument stands with regard, respectively, to those amendments adopted in 1982 and 1989 in Portugal, which have eliminated the well-known ideological and economical restrictions, and to the abortion law reform adopted in 2018 in Ireland. All of them, indeed, appeared to be something more than an amendment.

Conclusively, by all above, Albert argues that Constitutions should include "different procedures", respectively for routine and technical amendments and for those amendments which, *de facto*, affecting rights and government's structures, transform the constitutional system. In light of these considerations, Albert offers a definition of such type of amendments, stressing their impact on the constitutional order: more properly, they are a "dismemberment" of the Constitutions[9]. This conclusion is valid also when the scope of the amendment is to "consolidate the democracy", since in both circumstances we are facing with "irregular constitutional reforms". Having in mind this assertion, Albert proposes a new approach, the «content-based approach»[10] reaching the important conclusion that not all amendments are amendments in name alone and, those above, are reforms realizing a "constitutional dismemberment". More precisely: while an amendment must be consistent with the existing constitutional design, maintaining the constitutional continuity, a *dismemberment* affects the core commitment of a Constitution in force and it is therefore more than an amendment and less than a new Constitution.

Well, at this point, I would like to draw a first conclusion on Albert's book: from my side, the author deserves to be thanked by the comparative and constitutional scholars, because he stressed a key argument, namely that «Constitutions are not only a set of political intents of peoples joined together in a community, but they are also a set of rules having their own legal force and validity and whose aim is to preserve the social community's

death of a running candidate. Finally, he recalls the Spanish experience concerning the amendment of art 135 approved in order to tackle the 2011 financial crisis.

[8] As mentioned above, Albert's definitions are enriched by several examples including those constitutional texts less often quoted by comparative scholars. Indeed, beside the routine and technical amendments occurred in France, United States, Spain, Canada and Australia, Albert recalls amendments approved in Bangladesh and Sri Lanka. The same approach is followed in the illustration of the revolutionary amendments when Albert recalls those adopted in India, Greece and Turkey.

[9] See Part I, Section 2, par. "Amendments and Dismemberments".

[10] Ibidem, par. "Content - Based Approach".

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priorities»[11]. Indeed, he reminded us that, if it is true that constitutional norms are placed at the top of the hierarchy of norms, more properly, «the procedural amendment rules» must be placed at the very top, since «no part of a Constitution is so important than the procedures we use to change it».

2. The limits of the theories based on the "quantification" of the constitutional amendments

A further topic of Albert's research concerns the "relativity" of those theories based on the characteristics of the amendment procedural rules. In part two of the book, the author, addressing the subject of the *"rigidity and flexibility"* of the Constitutions, focuses on the techniques for measuring the amendment's difficulty[12]. Albert's vision can be understood, *inter alia*, when he analyzes Lutz's theory[13]. According to Lutz, the amendments constitutional processes - which he has studied in 32 democratic States - can be differentiated in 68 possible actions that could, in some combination, initiate and approve constitutional amendments. Lutz's main argument is that each action can be quantified by a score in relation to its degree of difficulty. Therefore, while initiating an amendment by the Executive's action is worth 0.25 units of difficulty, initiating an amendment in two separate votes of unicameral legislature by a two third majority is worth 1.75 units of difficulty, and so on. By proceeding in this way, Lutz has identified the States' most rigid Constitutions in relation to their score of difficulty. Accordingly, the USA's Constitution is the most rigid with 5.10 points, then follow, Switzerland, Venezuela, Australia, Costa Rica, Spain and Italy; the most flexible is the Constitution in force in New Zealand, where amendments requires only one step: the approval by a simple majority in the unicameral legislature.

Well, my second consideration on Albert's study can be gathered by his critical arguments on Lutz's theory.

In summary, Albert has initially demonstrated that the American system couldn't be a reference model[14], since in the USA coexist both the federal short and generalist Constitution and the length and detailed State Constitutions. Correctly, the author argues that a short and generalist Constitution, by definition, can be easily adapted to the present needs by the constitutional interpretation, while, on the contrary, the long and very

[11] The literature about this theme is immense. To be concise, I will only quote G. Morbidelli, *Lezioni di Diritto Pubblico Comparato. Costituzioni e Costituzionalismo*, Bologna, 2000 and the bibliography contained in it.
[12] Specifically, Part 2, section 3 *"Measuring Amendment Difficulty"*. Albert introduces the subject recalling the well-known studies devoted to "The Ranking Constitutions", such as those of Arend Lijphart (footnote n. 25), Astrid Lorenz (footnote n. 3) and Edward Schneier (footnote n. 36).
[13] This theory (Donald S. Lutz, *Principles of Constitutional Desing*, Cambridge, 2006) is described in Part 2, Section 3 "Constitutional Rigidity". Albert considers Lutz's theory as the leading ranking of comparative formal amendment difficulty.
[14] *Ibidem*, see par. "More Art than Science".

detailed ones can be more easily changed by the legislatures[15]. Consequently, since, all of it happens with disregard of the procedural rules, he argues that Lutz's proposal to consider the USA's constitutional system as a model is inappropriate.

Then, Albert formulates a set of more specific remarks on his theory, which I will briefly recall, adding my personal observations.

a) Lutz's theory suffers, according to Albert, of a general gap, since it focuses exclusively on formal amendments, missing the vast universe of changes deriving from the constitutional interpretation. In agreeing with Albert, I would like to add that, in some circumstances, the necessity to endorse the interpretation of the Constitution rather than amending it, can even be recommended to the Courts by the Constitutional Court. For example, according to the Italian constitutional Court's jurisprudence, local Courts, before raising the exception of unconstitutionality, have to make all efforts to offer an interpretation of the case-law in conformity with the Constitution, and, only if it is impossible, they are allowed to submit the case before the Constitutional Court[16]. This approach, at a closer look, *de facto*, increases the "elasticity" of a constitutional text in terms of its attitude to be interpreted and not changed for any needs.

b) Albert's second observation refers to the «strong culture of deference to codified constitutions», a factor, similarly, not adequately considered in Lutz's theory. As highlighted in Albert's book, scholars should not ignore «the undercurrent of popular resistance to the very idea of altering the Constitution», a factor which, as those above mentioned, can influence the alteration - or the not alteration - of a constitutional text, not taking into account the specificity of its amendment's procedural rules. Agreeing with Albert, I would like to recall a further example evinced by the Italian constitutional system. The former Constitution in force in Italy, the *Statuto Albertino*, was a flexible text; however, Italian scholars understand very well that, despite the lack of amendment procedural rules, the *Statuto* was actually "naturally rigid", since, like other Constitutions of that period, it marked the point of no return from the past: i.e. the absolute power of the monarchy. Thus, those constitutional principles reflecting the

[15] Indeed, see Part 2, section 3 "Amendment Culture as acceleration" American State constitutions have been amended over 7.500 times, amounting on average to 150 amendments per State.

[16] Cfr., M. Luciani, *Interpretazione conforme a costituzione*, in *Enciclopedia del diritto – Annali IX*, Milano, 2016, 391-476; R. Bin, *L'interpretazione conforme. Due o tre cose che so di lei*, in A. Bernardi (cur.), *L'interpretazione conforme al diritto UE. Profili e limiti di un vincolo problematico*, Napoli, 2015. The author stresses that a similar tendency exists in the Anglo-Saxon case-law. See, footnote 7 «The objective of avoiding unnecessary repeals by implication is given effect bythe 'plain repugnancy' standard, which requires courts to harmonize and preserve both laws if possible, and only invokes an implied repeal in the limited circumstance where harmonization is unachievable»: J. W. Markham jr., *The Supreme Court's New Implied Repeal Doctrine: Expanding Judicial Power to Rewrite Legislation Under the Ballooning Conception of "Plain Repugnancy"*, in 45 *Gonz. L. Rev.* 437 (2009/2010), 455; V.R. Pinardi, *L'interpretazione conforme a Costituzione e la sua «radicalizzazione» quale tema (e problema) di natura istituzionale*, in M. D'Amico, B. Randazzo (cur.), *Interpretazione conforme e tecniche argomentative*, Atti del convegno di Milano svoltosi il 6-7 giugno 2008, Torino, 2009, 373–387.

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new constitutional era were unamendable, despite the lack of a specific amendment's procedural rule[17].

3. Behind constitutional amendments there is a relevant process or should be in term on how they became law: the background and the time - factor

The third remarks on Lutz's theory concerns the need to be able to differentiate, taking into account the «importance of the amendments» in strict connection to the «temporal variability in constitutional rigidity»[18]. Correctly, Albert stressed that the same Constitution can be changed today easily, while only with difficulty tomorrow or vice versa, irrespective to the specificity of its amendment's constitutional rules.

This remark introduces a further observation.

We learn from Albert that those theories devoted to the constitutional amendment's procedural rules have to take adequately into account the "background" in which each amendment is adopted, or not adopted, since we should not forget that Parliaments are political institutions. Therefore, the amendability of a Constitution primarily depends on the «background, both historical and political», and, as a consequence, on the "time factor". Each argument concerning the amendment's constitutional rules is fallacious if it does not take into account this aspect.

Well, the "background" together with the "time factor" have hugely affected the amendments adopted in the European Member States in 2012. Albert mentions one of these amendments focusing on the new article 135 of the Spanish Constitution which introduced the "balanced budget amendment". According to this article, the State cannot spend more than its income «The State and the Self-Governing Communities may not incur a

[17] *Amplius*, cfr. F. Racioppi, I. Brunelli, *Commento allo Statuto del Regno*, vol. I, Torino, 1909, 194; P. Biscaretti di Ruffìa, Voce *Statuto albertino*, in *Enc. Dir.*, vol. XLIII, Milano, 1990, 981 ss. Then, more recently, A. Pace, *Potere costituente, rigidità costituzionale, autovincoli legislativi*, Padova, 1997. About the not relevance of the distnction between constitutional flexibility and rigidity cfr., M. Fioravanti, *Per una storia della legge fondamentale in Italia: dallo Statuto alla Costituzione*, in M. Fioravanti (cur.), *Il valore della Costituzione*, Bari, 2009, 7; R. Bin, *Che cos'è la Costituzione?*, in *Quad. Cost.*, 1, 2007, 13. Recently for some more general theoretical and practical aspects of the distinction between constitutional flexibility and rigidity and the implications in the Italian case cfr. T. Groppi, *La revisione della Costituzione. Commento all'art. 138*, in R. Bifulco, A. Celotto, M. Olivetti (cur.), *Commentario della Costituzione*, vol. III, Torino, 2006, 4 ss.; A. Morelli (cur.), *Alla prova della revisione. Settant'anni di rigidità costituzionale*, Napoli, 2019. On the same aspects in a comparative perspective *passim*, P. Vivian Schlein, *Rigidità costituzionale. Limiti e graduazioni*, Torino, 1997; E. Rozo-Acuña, *I procedimenti di revisione costituzionale nel diritto comparato*, Roma-Napoli, 1999; S. Gambino, G. D'Ignazio (cur.), *La revisione costituzionale e i suoi limiti: fra teoria costituzionale, diritto interno, esperienze straniere*, Milano, 2007; M. Calamo Specchia, *Parlamento e revisione costituzionale tra garanzie procedurali, diritti di partecipazione e tendenze maggioritarie*, in *Diritto Pubblico Comparato ed Europeo.*, nr. speciale 2019, 33-60; G. Grasso, *Da Berna a Budapest: appunti su revisioni costituzionali (totali e parziali) e tenuta dell'unità politica e di senso delle Costituzioni democratiche*, in *DPCE online*, 1, 2019, 95-107.

[18] Part 2, Section 3, "Temporal Variablity in Amendment difficulty".

structural deficit that exceeds the limits established by the EU for their Member States». Albert stressed that the Spanish system «saw a need to address rising crisis and law makers sized on amendment as the suitable vehicle to do it».

We can perceive the importance of this amendment only giving emphasis to its "background".

As above, the same constitutional reform was adopted in all European Member States which, likewise, between 2007 and 2012, were affected by a severe economic crisis. Namely, this reform, imposing the "balanced budget amendment", constituted the final step of a global law reform imposed by the European Union and consisting of eight regulations (the well-known, among the specialists, "six and two packs")[19], which have produced a huge impact on Member States constitutional and social systems. All of them, indeed, were under similar conditions, since, in that crucial moment, their economies were interdependent with each other: the financial crisis in one of them, would have a negative impact on the others. In this scenario, Member States of the Euro area and the European Institutions decided to set up a common budgetary timeline so that they could better synchronize the key steps in the preparation of national budgets[20].

The above rule is, undoubtedly, a big and relevant reduction of States sovereign power, also because these law reforms have extraordinarily reinforced the power of the EU Commission[21].

Consequently, it is legitimate to wonder: were these changes of Member State Constitutions just technical amendments or something more? The effects of the above legislative measures in States like Spain, Italy, Portugal and Greece, as Albert highlighted speaking about the 2016 constitutional reform in Brazil, is that the respective Governments «were to

[19] The six packs consist of five regulations and one directive. 1. Regulation 1175/2011 amending Regulation 1466/97: *On the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.* 2. Regulation 1177/2011 amending Regulation 1467/97: *On speeding up and clarifying the implementation of the excessive deficit procedure.* 3. Regulation 1173/2011: *On the effective enforcement of budgetary surveillance in the euro area.* 4. Directive 2011/85/EU: *On requirements for budgetary frameworks of the Member States.* The directive shall be implemented by all EU member states no later than 31 December 2013. 5. Regulation 1176/2011: *On the prevention and correction of macroeconomic imbalances.* 6. Regulation 1174/2011: *On enforcement action to correct excessive macroeconomic imbalances in the euro area.* The two packs consist of: Regulation 473/2013: *On common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.* Regulation 472/2013: *On the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.*

[20] To make it clear, by the mid of each October Member State Governments have to deliver to the European Commission their draft budget and the Commission is in charge of verifying its consistency in relation to those parameters elaborated by the EU (the so called "stability and growth pact"). Namely, whether the budgetary objectives of all subsectors of the general government and those of the territories are under the authority of the EU Commission.

[21] It is worth noting that the European Union - despite its ambiguity – still remain a confederation of States.

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gird the country for spending reduction on health and education»[22]. Like it happened in Brazil, the above reforms deeply affected EU Member States' social systems, with the effect, again like it happened in Brazil[23], to weaken the EU people's social rights, despite their protection is supposed to be safeguarded, both by the respective Constitutions and by the EU Treaty[24]. Therefore, more than technical amendments, those amendments just recalled above, from Member States' perspective, marked their transition from a form of government to another, or even from a form of state to another, appearing to be an evident "dismemberment" of their Constitutions.

Therefore, as Albert would recommend, they should be adopted by a different procedure, or, at least, they should be preceded by a vast debate involving the respective population and social partners. On the contrary, as far as I know, in some EU Member States and especially in those more seriously in trouble, the respective Parliaments passed the above amendment without making the population aware of the political, economic and constitutional implications of the change.

In this regard, a further noteworthy key factor, besides the background at the basis of the balanced budget's reform, is, reiterating Albert's definitions, the "time factor". Such factor proves how fallacious those theories based on the "quantification" of the constitutional amendment's procedures can be. In Lutz's ranking list, the Spanish Constitution is one of the most rigid in the world[25].

Well, rethinking about the amendment of the art. 135 of the Spanish Constitution, I can recall an emblematic episode happened to me while I was in Spain in 2012, invited as a member of a doctoral committee in the university of Valladolid. After the ceremony, together with my Spanish colleagues of the University of Madrid, we were on the train going back to the capital. I was just dousing off after a very busy day, but, despite the fatigue, I could hear my colleagues who were making remarks with irony exactly about that amendment. They were just saying: «[…] since its approval we have tried several times to change the Constitution of 1978; we have organized hundreds of meetings and debates on those parts which should be modified, often arguing with each other, but, at the end, for some reasons or other, due to the rigidity of our Constitution, the Parliament did not change it. Then, suddenly, a phone call from Brussels was enough to

[22] See, Part 1, Section 2 - "The Social State in Brazil".
[23] Albert stresses that the current Brazilian Constitution contains an entire section dedicated to social rights, including right to food and housing, to public healthcare, to social assistance and to education. All these provisions, as Albert underlined in order to emphasize their importance, were not touched by the 1988's constitutional reform.
[24] Art. 3.1 of the Treaty states that «the Union's aim is to promote peace, its values and the well-being of its peoples». Namely, among these values, art. 3.3 include, the «social exclusion and discrimination, the social justice, the equality between women and men and the solidarity between generations and protection of the rights of the child». On the EU institutional gaps in order to achieve its goals, cfr. L. Melica, *L'Unione europea, uno Stato ancora incompiuto che deve evolvere per frenare i «populismi»*, in *DPCE online*, *Editoriale*, 2, 2018.
[25] Behind the USA Constitution which scores point 5.10 follow the Constitutions respectively in force, in Switzerland, Venezuela, Australia, Costa Rica, Spain and Italy.

finalize, promptly, smoothly and quickly the change of one of the most rigid Constitution in the world!».

Indeed, the legislative draft was submitted before the Congress on August 26th and it was approved on September 2nd by the Congress and on September 7th by the Senate entering into force on September 27th: the change was, however, finalized in less than one month!

How was it possible?

Reiterating Albert's words, that «behind constitutional amendments there is a relevant process or should be in term on 'how they became law'», here is the picture of the Spanish situation in that period. The balanced budget's amendment was approved in 2012 while the Spanish State was in recession; the budget deficit increased by 11 percent of GDP in 2009 and banks lost the ability to borrow money or raise capital. Therefore, despite Spain had not lost access to market financing, raising money became increasingly expensive and so, in June 2012, the Government made an official request for financial assistance for its banking system to the Euro group for a loan of up to €100 billion.

That's why, when the Euro group asked in exchange to the Spanish Government/Parliament the approval of a new art. 135 of the Constitution, the reaction was immediate, with no regard for the complexity of the constitutional amendment's procedural rules!

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